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SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 532

ROBERT D. MORGAN,

Petitioner,

vs.

METRO-GOLDWYN-MAYER, INC.
a Delaware corporation,

Respondent,

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF
THE STATE OF ARIZONA

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether this Court should review a denial of a motion to set aside a judgment under Rule 60(c) of the Arizona Rules of Civil Procedure, where the reasons for the denial of that motion are (a) under Arizona law, a ruling of the Arizona Supreme Court on a prior appeal of the same case is now res judicata and dispositive of the rights of the parties and (b) even if the alleged acts of fraud and other misconduct were proven, under applicable Arizona law, there would have been no change in the result.

2. Whether this Court should consider an alleged federal jury trial issue which was neither raised before, nor considered by, the Arizona courts from which this Petition is taken, but which was properly presented to this Court three years ago in a Petition for Certiorari involving these same parties, seeking review of a final judgment of the Arizona courts squarely ruling upon the alleged federal issue.

ARIZONA RULE OF CIVIL PROCEDURE INVOLVED

Notwithstanding the Petitioner's assertions, this case does not involve any constitutional or statutory provisions. Rule 60(c) of the Arizona Rules of Civil Procedure provides as follows:

> "60(c) *Mistake; inadvertence; surprise; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons

(1), (2) and (3) not more than six months after the judgment, order or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant served by publication as provided by Rule 59(j) or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. Amended July 14, 1961. Effective on and after midnight Oct. 31, 1961."

STATEMENT OF THE CASE

This is the second time that this case, involving these same parties, has been before this Court. The first time, in *Morgan v. Hays,* 389 U.S. 859, No. 454, O.T. 1967, an alleged federal issue was involved, the jury trial issue which the Petitioner attempts to inject into the instant proceeding. This Court denied the Petition for Certiorari in that case, Mr. Justice Black and Mr. Justice Douglas noting their opinion that certiorari should be granted.

The issues in the instant case are far more limited than the first time the case was before this Court. The issues presented by this Petition arise in the context of a denial by the trial court of a motion which the Petitioner entitled "motion for new trial on grounds of newly discovered evidence, fraud, other substantial reasons justifying relief" under Rule 60(c) of the Arizona Rules of Civil Procedure.[1] The judgment which this Petition seeks to review is not the 1967 judgment of the Arizona Supreme Court dealing with jury trial, but rather the 1970 judgment of the Arizona Court of Appeals dealing with a motion under Rule 60(c) of the Arizona Rules of Civil Procedure.

On this go-round of the case, there is no jury trial issue nor

[1] As the Arizona Court of Appeals pointed out, the motion was actually one to set aside the judgment.

any other federal issue. Indeed, no federal issue was even urged at any stage before the Arizona courts. Jury trial as an issue in this second phase of the *Morgan v. MGM* litigation is now raised for the first time before this Court. The sole issues in the case at this time are issues of Arizona state law.

A brief chronology of the facts of the case will highlight both the lack of any federal issue in the present Petition, and also the correctness of the Arizona courts' holdings.

The Petitioner was injured near Superior, Arizona on April 9, 1962 while working for the Respondent as a stuntman in the filming of the movie, "How The West Was Won." MGM had obtained Workmen's Compensation insurance for its employees, both in the State of Arizona and also in the State of California, during the entire time that Petitioner was employed by MGM. Under governing Arizona law, Workmen's Compensation coverage by the employer precludes suit against the employer by an injured employee if either (1) the employer has complied with legal requirements concerning the imparting of notice to the employee and keeping available rejection slips (by means of which the employee can reject Workmen's Compensation coverage, if he so elects) A.R.S. § 23-906, or (2) the employee has actually applied for *or* accepted Workmen's Compensation benefits. A.R.S. § 23-1024.

Following his admission to the hospital, on two separate occasions, April 16, 1962, and April 19, 1962, Petitioner sought and obtained the advice of two attorneys from a prominent Phoenix law firm, Snell & Wilmer. The trial judge found that on the occasions of those interviews with his attorneys, he was "lucid and responsive."[2] These attorneys advised him that he should apply for and accept Workmen's Compensation.

Because the Petitioner bases his entire case upon the circum-

[2]Finding of fact No. 30. (Appendix pp. 27-28). For the Court's convenience the original findings of fact and conclusions of law made by the trial judge in 1965 are set forth in full as Appendix A to this Brief.

stances surrounding the execution of the form C-407— executed on April 23, 1962—a brief comment concerning that document is in order. We strenuously deny all implications of fraud and other misconduct imputed to Mr. Richard J. Daniels, then Chief Counsel for the Industrial Commission, in connection with the obtaining of form C-407. Mr. Daniels himself, and also Mr. Aaron Nelson, then head of the Industrial Commission's Private Carrier Department, have unequivocally denied any such misconduct.[3]

Upon analysis, it does not matter whether Petitioner signed the form C-407 or not. The really significant fact surrounding the form C-407, is that the Arizona courts have ruled that it can be completely disregarded without making any difference to the outcome of the case. Under applicable Arizona law, therefore, the circumstances surrounding its execution are irrelevant. Indeed, the form C-407 was not even offered in evidence by the defendant, but rather by the plaintiff, as plaintiff's Exhibit 41. The execution of the C-407 was only one in a long series of applications for and acceptances of Workmen's Compensation benefits by the Petitioner. The trial judge made the following findings dealing with the waiver issue:

> 33. Thereafter [following execution of the C-407] and on May 23, 1962; June 27, 1962; July 13, 1962; July 20, 1962; July 28, 1962; August 2, 1962; August 16, 1962; September

[3]Included in the record in this case are sworn statements by Mr. Daniels and Mr. Nelson. Both of these affidavits deny that the assignment of Mr. Jurgemeyer to make the trip to Casa Grande was for the purpose of making himself unavailable as a witness.

Concerning the obvious conflict between these statements of Messrs. Daniels and Nelson on the one hand, and Mr. Jurgemeyer on the other, we can only point out that as the Petitioner himself recognizes, Mr. Jurgemeyer has told three different stories concerning the obtaining of plaintiff's exhibit 41.

For reasons set forth in the body of the brief, the imputations of improper conduct in connection with the obtaining of the form C-407, plaintiff's Exhibit 41, are irrelevant in any event. For whatever interest the Court may have in this matter, however, we have attached the affidavits of Mr. Daniels and Mr. Nelson as Appendices B and C, respectively, to this brief.

1, 1962; September 16, 1962; October 1, 1962; October 17, 1962; November 2, 1962; November 16, 1962; and December 2, 1962, plaintiff executed or caused to be executed documents entitled "Workman's Supplemental Claim for Compensation" and filed or caused the filing of said documents with the Industrial Commission of Arizona, knowing and understanding that these were claims for Workmen's Compensation.

34. The Industrial Commission of Arizona caused to be paid and plaintiff accepted Workmen's Compensation Benefits pursuant to each of the aforesaid "Workman's Report of Injury and Application for Benefits" and "Workman's Supplemental Claim for Compensation" under and pursuant to the provisions of the laws of the State of Arizona for the period from April 10, 1962, through November 16, 1962, in the total sum of $4,795.41.

35. In addition to the aforesaid Workmen's Compensation Benefits, the Industrial Commission of Arizona paid or caused to be paid medical and hospital expenses of plaintiff in the sum of $15,246.70. (Findings of Fact Nos. 33-35, Appendix pp. 28-29.)

Based upon these findings the trial court held that:

6. The plaintiff, by making a claim for Workmen's Compensation Benefits and continuing to accept the same with full knowledge of his legal rights and with full knowledge of the legal conditions precedent to a suit against his employer, waived any right or option, if any, which he ever had to file any claim in this Court against his employer. (Conclusion of Law No. 6, Appendix p. 30.)

Thus, on fourteen different occasions, extending over a period of more than six months, the Petitioner applied for and received Workmen's Compensation benefits and medical and hospital expenses totalling some $20,000.00.[4] It has never been contended at any stage of these protracted proceedings, that these applications for and acceptance of Workmen's Compensation and medical and hospital benefits were in any way tainted. The dispositive

[4]The Petitioner is, of course, still entitled to Arizona's Workmen's Compensation benefits, which are among the most liberal in the nation. His entitlement extends to benefits which have accrued since the time he stopped accepting such benefits in December of 1962.

point is that under Arizona law, either application for *or* acceptance of Workmen's Compensation constitutes a waiver of the right of the employee to sue his employer.[5] Indeed, the Arizona Supreme Court, in its 1967 opinion in this case, held that the acceptance of these benefits by Mr. Morgan constituted a waiver under controlling Arizona law. That Court's holding was as follows:

> The [trial] court went on to find that claims had been presented, and petitioner was paid compensation in a total sum of $4,795.41, and medical and hospital expense in the sum of $15,246.70. These findings of the court were substantially supported by the evidence. Under these circumstances we do not feel that the court erred in its conclusion that there had been a waiver. *Since the waiver alone is sufficient, it is not necessary for us to pass upon the other matters raised by the petitioner* in regard to the jurisdiction of the court, and having decided this case upon its merits it is not necessary for us to pass upon

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[5] A.R.S. § 23 1024 A provided at times material to this litigation as follows: § 23-1024. Choice of remedy as waiver of alternate remedy

A. An employee, or his legal representative in event death results, who makes application for an award, or with the consent of the commission accepts compensation from an employer, waives the right to exercise any option to institute proceedings in court.

The Petitioner contends that there is no evidence in the record that he knew that by applying for and accepting these payments he was waiving his right to sue. In the first place, the trial court found that he received legal advice from two attorneys, and that they advised him both orally and in writing that he should accept Workmen's Compensation benefits. (Finding of Fact Nos. 29-31, Appendix pp. 27-28.) The trial court also found that Petitioner "filed or caused the filing of said documents knowing and understanding that these were claims for Workmen's Compensation" (Finding of Fact No. 33, Appendix *Id.* at 28) and held that "the plaintiff, by making a claim for Workmen's Compensation Benefits and continuing to accept the same with full knowledge of his legal rights and with full knowledge of the legal conditions precedent to a suit against his employer, waived any right or option, if any, which he ever had to file any claim in this Court against his employer." (Conclusion of Law No. 6, Appendix *Id.* at 30.) Therefore in contending that there is no evidence Morgan knew what he was doing, Petitioner ignores the trial court's findings and conclusions. Moreover, the extent of any knowledge required to effect a waiver under the statute is solely a matter of Arizona law.

the propriety or the timeliness of the filing of the writ of certiorari after the time for appeal has expired. *Morgan v. Hays,* 102 Ariz. 150, 156, 426 P.2d 647 (1967). Appendix to Petition for Certiorari, page A-13. (Emphasis added.)

Therefore, the Arizona Supreme Court has expressly held that under Arizona law the presentation of claims and the acceptance of $4,795.41 in Workmen's Compensation and $15,246.70 in medical and hospital expenses by Mr. Morgan constituted a waiver of his right to sue his employer.

Against this background, the correctness of the ruling of the Arizona Court of Appeals from which this Petition for Certiorari is taken, becomes apparent. All of the Petitioner's allegations of misconduct pertain solely to plaintiff's Exhibit 41, the form C-407.[6] But the Arizona Supreme Court has held in a prior decision in 1967 — and this holding is res judicata under Arizona law — that the acceptance of benefits, wholly aside from the C-407, is sufficient standing alone to constitute a waiver of the common law right to sue. As the Court of Appeals observed in the opinion which the Petitioner asking this Court to review;

"However, assuming actual fraud in the procurement of Form C-407, the initial application in 'making a claim' — would this fact alone raise matters which would place appellant's motion outside of the compass of the mandate [of the Supreme Court in *Morgan v. Hays*]? We believe that it would not. The decision upon which the mandate is based goes far beyond 'making' the initial form C-407 claim, and is based primarily upon appellant's personal knowledge, the legal advice he received, and his continued application for and acceptance of Workmen's Compensation benefits over an extended period of time and therefore if fraud existed initially, it is immaterial. The findings of fact set out herein sufficiently illustrate this point

[6]The only conceivable purpose for which the Petitioner might have used Mr. Jurgemeyer as a witness was for the purpose of establishing facts relevant to plaintiff's Exhibit 41, form C-407. Indeed the Petitioner clarified in his reply brief before the lower court that this was the sole purpose for which he would have used Mr. Jurgermeyer as a witness (Appellant's Reply Brief, Morgan v. MGM, Arizona Court of Appeals, No. 1 CA-CIV 746, p. 20.)

without further elaboration." *Morgan v. MGM*, 11 Ariz. App. 223, 227, 463 P.2d 118 (1970). Appendix to Petition for Certiorari, p. A-30.

The findings of fact referred to by the Court of Appeals are those which are numbered 33, 34 and 35, set forth above.

Accepting fully, therefore, the Petitioner's proposition that a judgment obtained by fraud may not have res judicata effect, that proposition is immaterial where, as here, the alleged fraud pertains to matters outside the scope of the original holding. Every single allegation of improper conduct — fraud in secreting a witness, forgery, bribery — relates solely to plaintiff's exhibit 41; the Arizona courts have ruled that under Arizona law (1) plaintiff's exhibit 41 can be disregarded without changing the judgment, and (2) the Petitioner is foreclosed from raising the issue because of a prior judgment involving these same parties.

In any event, these rulings involve solely matters of Arizona law, on which the Arizona courts have spoken. Significantly, the Arizona Supreme Court denied the petition for review of the Court of Appeals decision.

REASONS FOR DENYING THE WRIT

I.

There Is No Federal Issue In This Case

At the time that this case was before this Court three years ago, there was an arguable federal issue — whether Petitioner had a federal right to a jury trial on the question of whether, under the Arizona Workmen's Compensation law, he was precluded from bringing a common law action against his employer. That issue was squarely presented and briefed by both Petitioner and Respondent at that time, and this Court denied the Petition. *Morgan v. Hays*, O.T. 1967, No. 454, cert. den. 389 U.S. 859.

The present case does not involve a jury trial issue or any other federal issue. The decision of the Arizona Court of Appeals from which this Petition is taken is an affirmance of the trial court's

denial of a motion to set aside a judgment under rule 60(c) of the Arizona Rules of Civil Procedure. The sole issues which are presented by this case are issues pertaining to the propriety of the trial judge's denial of that motion. Neither under Rule 60(c) of the Arizona Rules of Civil Procedure nor under its federal counterpart, Rule 60(b) of the Federal Rules of Civil Procedure, is there any provision for jury trial on motions to set aside a judgment. Under both the federal and the state rules, such motions are addressed to the discretion of the trial judge. *Provident Sec. Life Ins. Co. v. Gorsuch*, 323 F.2d 839 (9th Cir. 1963), cert. den. 376 U.S. 950; *Laguna Royalty Co. v. Marsh*, 350 F.2d 817 (5th Cir. 1965); *Parker v. Broadcast Music, Inc.*, 289 F.2d 313 (2d Cir. 1961); *Thomas v. Goettl Bros. Metal Products, Inc.* 76 Ariz. 54, 258 P.2d 816 (1953); *Marsh v. Riskas*, 73 Ariz. 7, 236 P.2d 746 (1951).

The Petitioner himself concedes that his 1967 Petition for Certiorari filed in this Court was based "upon the grounds that Petitioner had been denied the right of jury trial guaranteed by the Seventh and Fourteenth Amendments and that he had further been denied due process of law." Petition, p. 6. That Petition was denied. Upon the denial of that Petition, the judgment that Petitioner was not constitutionally entitled to a jury trial on the waiver issue became res judicata as between these parties. *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939); *Heiser v. Woodruff*, 327 U.S. 726 (1946); *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

Three years ago this Court considered and denied a Petition seeking review of decisions of the Arizona courts holding that the queston of waiver is a question for the court rather than the jury. The case as it comes before the Court at this time does not involve that issue. It involves only the denial of a motion under Rule 60(c) of the Arizona Rules of Civil Procedure.

II.

The Petitioner Did Not Raise the Purported Federal Issue Before the Lower Courts

Even if the purported jury trial issue were present in the instant case, and even if the issue had not been ruled upon by this Court on a prior Petition for Certiorari involving these same parties, the Petitioner would nevertheless be foreclosed from raising the issue at this stage because of his failure to raise it before the Arizona courts. *Beck v. Washington*, 369 U.S. 541, 550-554 (1962); *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-463 (1936); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919).

The purported jury trial issue was not presented at any stage before the Arizona courts. The Arizona Court of Appeals correctly summarized the issues raised by the Petitioner before that Court as follows:

> "Appellant raises three questions on appeal: First, did the trial court abuse its discretion in denying plaintiff's motion for a new trial pursuant to Rule 60(c), Rules of Civil Procedure; Second, were the facts shown upon plaintiff's motion for new trial such as would probably have changed the result, should a new trial be granted; and, Third, was the appellant required to show due diligence in securing the facts and evidence relied upon in his motions for new trial," 11 Ariz. App. 223, 225, Appendix to Petition for Certiorari, p. A26.

Rule 23 1 (f) of the Rules of this Court provides as follows:

> (f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter

appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

The Petitioner has not complied, and could not comply, with the requirement of Rule 23 that he "show that the federal question was timely and properly raised so as to give this court jurisdiction to review *the judgment* on writ of certiorari." (Emphasis added.)

"The judgment" sought to be reviewed in the instant case is not the 1967 judgment dealing with the jury trial issue, but rather the 1970 judgment affirming the denial of a motion to set aside judgment under Rule 60(c) of the Arizona Rules of Civil Procedure.

Here again, the fact that the federal issue was timely raised before the Arizona Supreme Court in 1967 is immaterial. This Petition does not seek review of the 1967 judgment of the Arizona courts, nor could it. Review of that judgment by this Court has already been attempted by the Petitioner and denied by this Court.

Gant v. City of Oklahoma City, 289 U.S. 98 (1933) and other cases upon which Petitioner relies, only emphasize the Petitioner's error. Those cases stand for the proposition that where a case is remanded to the state court by this Court on the ground that the state court decision was not final and therefore not reviewable by this Court, this Court will consider the federal issues when the case reaches this Court on a petition from a final state court judgment, so long as the federal issue was raised at some appropriate point. The reason for such a rule is obvious. The federal issue is not before this Court until a Petition is taken from a final judgment of the state court.

It has never been contended, nor could it have been contended, that the decision which was reviewed by this Court in *Morgan v. Hays* in 1967 was not final. It was final. As a conse-

quence, the federal issue was presented to this Court and argued on its merits both by the Petition for Certiorari and by the Brief in Opposition. The ruling of this Court was a denial of the Petition for Certiorari, not a remand on the ground that the decision of the state court was not yet final.

If there had been a finality issue in *Morgan v. Hays* in 1967, and if this Court had remanded at that time because the case was not final, then the jury issue would be before the Court now. But there was no finality problem in *Morgan v. Hays*. The "QUESTIONS PRESENTED" by that case, as viewed by the parties, were as follows:

For the Petitioner:

"1. Despite the commands of the Seventh and Fourteenth Amendments to the Constitution of the United States, may an Arizona Superior Court refuse a plaintiff a jury trial seasonably demanded upon the fact issues which must be resolved in making a determination as to whether or not a workman is within the coverage of the Arizona Workmen's Compensation Act or alternatively, has an option to maintain a common-law negligence action when these fact issues are interwoven with the fact issues of the total case and the evidence is in sharp dispute?

"2. May a Superior Court Judge, on a defendant's motion to dismiss, grant the defendant's affirmative defenses of *"waiver, release* and *election of remedies"* in view of the Federal Constitutional mandates which afford Petitioner a trial by jury by virtue of the applicability of the Due Process clause of the Fourteenth Amendment to the states?"

Petition for Certiorari, Morgan v. Hays, No. 454, O.T. 1967, p. 2, (Emphasis in original.)

For the Respondent:

"Whether this Court should overrule almost a century of decisions of this Court and numerous other federal and state courts, and require the states to furnish jury trials conforming to the federal model in all civil cases involving more than $20.00."

Brief in Opposition to Petition for Certiorari, Morgan v. Hays, No. 454, O.T. 1967, p. 2.

These issues having been presented to the Court in *Morgan v. Hays,* and the Court having denied that Petition, the sole issues presently before the Court are those which were presented to, and considered by, the Arizona Court of Appeals in the decision which the Petitioner is now asking this Court to review.

III.

The Judgment of the Arizona Courts Rests Upon Adequate and Independent State Grounds

It is well settled that "this Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn,* 324 U.S. 117, 125 (1945). See also *Williams v. Kaiser,* 323 U.S. 471 (1945); *Black v. Cutter Laboratories,* 351 U.S. 292 (1956).

In the instant case, there are not only adequate and independent state grounds for the judgment which the Petitioner seeks to review; the only grounds for that judgment are state grounds.

(A) The judgment which this Petition seeks to review is a judgment affirming the denial by an Arizona trial judge of a motion to set aside a judgment under Rule 60(c) of the Arizona Rules of Civil Procedure. Under this rule, as well as under Rule 60(b) of the Federal Rules of Civil Procedure from which it was taken, the grant or denial of the motion is a matter which rests within the discretion of the trial judge, who has heard the evidence, had opportunity to assess it, and is most qualified to determine whether the introduction of additional evidence would change the result. *Laguna Royalty Co. v. Marsh,* 350 F.2d 817 (5th Cir. 1965); *West v. Gilbert,* 361 F.2d 314 (2d Cir. 1966), cert. den. 385 U.S. 919; *Raulins v. Wilson,* 66 Ariz. 267, 187 P.2d 322 (1947). In this case the trial judge denied

the 60(c) motion because, *inter alia*, "plaintiff has not produced any new evidence which would change the judgment of this Court and which if heard would have produced a different result . . . ." (Abstract of Record before lower court, p. 304.) This is one of the grounds on which the trial court was affirmed by the Court of Appeals, that Court's opinion stating "it is equally clear that [Petitioner's] second question — that the facts shown would probably have changed the result if a new trial were granted — is not supported by the record." 11 Ariz. App. 223, 227, Appendix to Petition for Certiorari, p. A-30.

Thus, the lower court has held that under Arizona law, in order to support a motion under Rule 60(c), the movant must show that the "new" evidence, if admitted, would probably have changed the result. The lower court also ruled that the Petitioner failed to prove this essential aspect of his case. These holdings involve solely issues of Arizona law.

(B) Even if all of the Petitioner's allegations concerning misconduct were correct — and we strenuously deny them — the allegations all pertain to the circumstances under which the form C-407, plaintiff's Exhibit 41, were obtained.[7] Though Peti-

[7]Perhaps it would be better not to dignify the intemperate and conclusory assertions of "shabby fraud" which permeate the Petition by even acknowledging their existence. However, because of the implication that not only officials of the Arizona Industrial Commission, but also the Arizona courts have somehow become co-conspirators in denying the Petitioner's rights, a brief reply is warranted. The Petitioner would imply that his allegations of misconduct are an established fact, an implication which is unfounded. As the matter was presented to the trial court—and subsequently to the appellate courts—there was a conflict in the evidence concerning whether any impropriety existed in connection with the form C-407. With regard to the alleged secreting of a witness—upon which the Petitioner dwells most heavily—the conflict in the evidence was a conflict between the testimony of not only the chief counsel for the Arizona State Industrial Commission but also the head of the Private Carrier Department of the Industrial Commission, as opposed to one of three stories which have been told by a claims investigator for the Industrial Commission.

Very simply, the Arizona courts found it unnecessary to resolve this conflict, and therefore did not do so, because of their holding that under

tioner has never been willing to acknowledge these rulings, both the Arizona Supreme Court in the 1967 decision, *Morgan v. Hays*, and the Court of Appeals in the instant case have squarely held that as a matter of Arizona law — independent of whatever significance the C-407 might have had — Petitioner's written applications for and acceptance of Workmen's Compensation and hospital and medical benefits on fourteen different occasions over a period of more than six months constitutes a waiver of his right to sue his employer.

Therefore, even if Petitioner were correct in asserting that the alleged "fraud perpetrated by the chief counsel and subordinate employees of the Arizona Industrial Commission violated the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth" (Petition p. 19) the argument is nevertheless wide of the mark. The Arizona courts have held that Petitioner's application for and acceptance of benefits under the Workmen's Compensation Act on numerous occasions subsequent to and independent of the execution of plaintiff's Exhibit 41 are sufficient standing alone to constitute a waiver under Arizona law. There has never been any allegation of fraud or other misconduct pertaining to the applications for and acceptance of benefits subsequent to April 23, 1962.

The Petitioner asserts that had it not been for the execution of form C-407 the Industrial Commission "would have been entirely without jurisdiction and could not have made an award of benefits of any kind," (Petition, p. 13) citing *Collins v. Indus-*

Arizona law the presence or absence of the plaintiff's Exhibit 41 made no difference in any event. There is nothing unconstitutional, sinister, or even unusual about such a holding. Indeed, it is customary procedure both in this Court and other courts not to pass upon issues which are not essential to the decision of the case. This is especially true of alleged fact issues urged before an appellate court. It is therefore not only unnecessary but also unfair to state that the Arizona courts have been unequal to the task of preserving the Petitioner's constitutional rights, when all that those courts have held is that they will not decide an issue which under controlling Arizona law is not essential to the disposition of the case.

trial Commission, 102 Ariz. 509, 433 P.2d 801 (1967). This assertion ignores the provisions of A.R.S. § 23-1024, (see footnote 5) and the holdings of the Arizona courts in these *Morgan v. MGM* cases. The statute plainly provides that application for *or* acceptance of benefits constitutes a waiver of common law rights, and in this case the Arizona courts have held that by his application for and acceptance of benefits — aside from the C-407 — Morgan waived his common law rights. Here again, therefore, Petitioner is simply quarreling with the Arizona courts on an issue of Arizona law. *Collins v. Industrial Commission* holds that the Industrial Commission does not have jurisdiction in the absence of any formal written claim being filed with the Commission. We disagree with the Petitioner that the *Collins* holding is inconsistent with the holding presently at issue, since in this case formal written claims were filed, fourteen of them in all. But the scope of the *Collins* holding, and its bearing, if any, on the issues in this case, are questions for the Arizona courts.

(C) In addition to sustaining the trial court on the ground that the "new" evidence would not have changed the result, the Court of Appeals also held that under Arizona law, the ruling of the Arizona Supreme Court in *Morgan v. Hays* was res judicata, and that the issue of MGM's amenability to suit could not be raised again. The Arizona Supreme Court declined to review this holding by the Court of Appeals.

The effect of a prior judgment of an Arizona court interpreting Arizona's Workmen's Compensation statutes involves solely questions of Arizona law. Even the Petitioner implicitly recognizes this. In his Petition, he is forced to contend that the lower courts erred in applying Arizona law: "Arizona is committed to the principle that a final judgment may always be impeached for fraud . . ." Petition, p. 17. The Petitioner's assertions notwithstanding, the lower court has held that a final judgment may not be impeached for fraud, where the alleged fraud pertains to matters outside the scope of the original mandate. Even more important, however, even if the Petitioner were correct as to the

Arizona law of judgments, this Court does not sit to correct errors of state courts in announcing state law.

(D) Under applicable Arizona law Workmen's Compensation coverage precludes suit against the employer by an injured employee if either (1) the employer has complied with legal requirements concerning notice of coverage and availability of rejection slips, A.R.S. § 23-906, or (2) the employee has actually applied for or accepted Workmen's Compensation benefits, A.R.S. § 23-1024.

The trial court in its 1965 judgment ruled in favor of the defendant on both of the foregoing grounds. (See Findings of Fact and Conclusions of Law, Appendix A, pp. 22-30.) The Arizona Supreme Court in 1967 affirmed solely on the waiver ground, finding it unnecessary to deal with other issues, including the sufficiency of notice and availability of rejection slips. However, the trial court's original holding on this issue cannot be ignored, and it constitutes a sufficient and independent state ground for the decision.

The notice which the trial court found sufficient to satisfy the statutory requirements was actual, rather than constructive notice.[8] As set forth in the trial court's findings of fact, after the decision of the Arizona Supreme Court in *Gene Autry Productions v. Industrial Commission*, 67 Ariz. 290, 195 P.2d 143 (1948) and the adoption of A.R.S. § 23-1041 E, the Arizona Industrial Com-

[8]Under A.R.S. § 23-906, constructive notice is given by posting written notices at conspicuous places on the employer's premises. In the context of the movie industry, the difficulty of keeping these notices posted in "conspicuous" places is immediately apparent, because of the ambulatory nature of the work done in filming movies. The instant case provides an excellent example. Filming work for "How The West Was Won" was accomplished in Arizona at a variety of locations. The trial court held that MGM had posted notices at some of these locations, but that proof of notice posting was inadequate as to others. (Findings of Fact Nos. 17, 24, 25, Appendix pp. 26-27.) The inherent difficulty of giving constructive notice to members of the movie industry demonstrates the wisdom of the procedure which has been worked out between the Arizona Industrial Commission and the industry to give actual notice by means of the endorsement discussed above.

mission and the movie industry negotiated and agreed upon an endorsement to Workmen's Compensation insurance policies issued to members of the movie industry in the State of Arizona. The purpose of this endorsement — Exhibit 25 in evidence in this case — was to give actual notice to movie industry employees of the existence of Workmen's Compensation insurance benefits; their right to reject Workmen's Compensation coverage; the amount of benefits to which they would be entitled; and the fact that if they did not reject the coverage they would be deemed to have accepted it. (Finding of Fact Nos. 9-11, Appendix pp. 24-25.)

It is the practice of the Industrial Commission to assign an investigator to each employer filming a picture or portion of a picture in Arizona. This investigator presents the above-described endorsement to each employee of such employer for signature, and if requested, explains the purpose and function of the document. (Findings of Fact No. 12, Appendix p. 25.) Such an endorsement was presented to Mr. Morgan on March 12, 1962, and he signed it. (Finding of Fact No. 14, Appendix p. 25.)

The trial court held that the imparting of notice by means of Exhibit 25 satisfied the notice requirements of the Arizona statutes.[9] (Conclusions of Law Nos. 2-4, Appendix pp. 29-30.) The Arizona Supreme Court found it unnecessary to review this holding and it has never been upset by any court. Therefore, it constitutes an independent state ground for the judgment.

(E) Assuming *arguendo* that this Court were willing to overlook the Petitioner's failure to raise the federal issue in the lower courts, and the fact that this issue was already passed upon by this Court three years ago, and assuming further that the Court were now to conclude that the Petitioner is entitled

[9]This holding is also in accord with the holdings of other courts. See *Daniels v. Charles Boldt Co.*, 88 S.E. 613 (W.Va. 1916); *Maynard v. Island Creek Coal Co.*, 175 S.E. 70 (W.Va. 1934); *Globe Indemnity Co. v. Peckham*, 92 A.2d 406 (N.H. 1952); and *Dey v. Logan*, 7 S.E.2d 402 (Va. 1940).

to a jury trial on the waiver issue, there would still be separate and independent state grounds which have nothing to do with the waiver issue. For example, the holding of the Arizona courts dealing with the effect of a prior judgment under Arizona law involves a legal question to be decided by the court, and not a question which must, as a matter of constitutional right, be submitted to a jury. Not even the Petitioner has ever contended otherwise. Thus, when the res judicata issue was briefed and argued before the lower courts, Petitioner did not contend that he was entitled to a jury trial on that issue.

Similarly, the original holding of the trial court in 1965 that by giving actual notice as opposed to constructive notice, MGM sufficiently complied with the notice requirements of the Arizona statutes, was a ruling on an issue of law. No one has ever contended, nor could it be contended, that that ruling involved an issue for the jury. There was no dispute concerning whether Morgan did or did not sign Exhibit 25. The sole question was the legal effect of the signing of that document under Arizona law.

Therefore, even if this Court were to hold that the Seventh and Fourteenth Amendments require that the waiver issue be decided by a jury, such a holding would still not entitle Petitioner to a new trial in this case because there are other, dispositive, state grounds for the judgment of the lower courts, which do not involve jury questions.

CONCLUSION

Over a period of eight years this case has now been before four different courts on ten different occasions, seven of which involved appellate court review sought by the Petitioner. There comes a time in the history of every litigation when all relevant issues have been laid to rest, and the litigation must come to an end. We submit that that time has now come for Morgan v. MGM. The Petition for Certiorari should be denied.

Respectfully submitted,

ROBERT K. PARK
1616 W. Adams
Phoenix, Arizona

JENNINGS, STROUSS & SALMON
by Rex H. Moore
Rex E. Lee
111 W. Monroe
Phoenix, Arizona
Attorneys for Respondent

APPENDIX A

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

ROBERT D. MORGAN, Plaintiff vs. METRO-GOLDWYN-MAYER, INC., a Delaware corporation, Defendant	No. 145087 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This matter having come on regularly for hearing before the Court on June 10, 1964, on Defendant's Motion to Dismiss, and the Court having heard evidence on said date, and the hearing of evidence having continued through June 11, 12 and 15, respectively, and the Court having heard argument of counsel, taken the matter under advisement, and now being fully advised in the premises makes Findings of Fact, Conclusions of Law, and enters Judgment as follows:

FINDINGS OF FACT

1. The plaintiff, Robert D. Morgan, is, and at all times relevant hereto was, a citizen and resident of the state of California.

2. The Defendant, Metro-Goldwyn-Mayer, Inc., hereinafter referred to as "employer", is, and at all times relevant hereto was a corporation incorporated under and by virtue of the laws of the State of Delaware and having a principal place of business in Culver City in the State of California.

3. On March 9, 1962, at the offices of employer in Culver City, California, Plaintiff entered into a written contract of employment with the employer whereby Plaintiff agreed to perform as a stunt man for employer in the filming of a motion picture entitled "HOW THE WEST WAS WON", which picture was to be partially filmed at various locations in the State of Arizona.

4. This Court can and does take judicial notice of the provisions of Sections 3600.5 and 3601 of the Labor Code of the State of California, as follows:

"§ 3600.5 Injuries in extraterritorial employment

"(a) Domestic employment; foreign injury. If an employee who has been hired or is regularly employed in this State receives personal injury by accident arising out of and in the course of such employment outside of this State, he, or his dependents in the case of his death, shall be entitled to compensation according to the law of this State.

"§ 3601. Exclusive remedy. Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706, the exclusive remedy against the employer for the injury or death." (Stats. 1937, C. 90, p. 269, §3601.)

The Court can and does take judicial notice of the fact that the aforesaid statutes were in full force and effect on the date that plaintiff was injured in the course and scope of said employment in the State of Arizona as hereinafter set forth.

5. The employer fully complied with the laws of the State of California and had in full force and effect Workmen's Compensation Insurance in compliance with the laws of the State of California which covered the plaintiff in his employment by employer.

6. The employer complied with the laws of the State of Arizona with respect to securing Workmen's Compensation Benefits for the plaintiff and the employer's other employees by obtaining a policy of insurance in the State Fund of Arizona through the

Industrial Commission of Arizona which said policy was in full force and effect at all times relevant hereto.

7. The employer is a member of the movie industry, and among other things, engaged in the business of filming and making motion pictures.

8. The Court takes judicial notice of the case of *Gene Autry Productions against Industrial Commission*, 67 Ariz. 290, and its holding.

9. The Court can and does take judicial notice of the fact that subsequent to the decision of the Supreme Court of Arizona in the *Gene Autry Case*, Supra, the people of Arizona adopted an initiative measure which became effective on November 22, 1948, and which is now subsection E of Section 23-1041, Arizona Revised Statutes, which said initiative measure provided that in computing the average monthly wage of employees for purposes of Workmen's Compensation, there shall be excluded from such computation all amounts or wages or other compensation for services in excess of $1,000.00 per month.

10. That after the adoption of the aforesaid initiative measure the Industrial Commission of Arizona and the movie industry negotiated and agreed upon an endorsement to Workmen's Compensation Insurance policies issued to members of the movie industry in the State of Arizona; which endorsement is in the form of "Exhibit 25" in evidence, said exhibit being an endorsement to and a part of the Workmen's Compensation Insurance policy issued to the employer in connection with the filming of the picture "HOW THE WEST WAS WON".

11. The purposes of the aforesaid endorsement to said Workmen's Compensation Insurance policies and the administrative practices adopted by the Industrial Commission of Arizona in connection with the use thereof is to give actual notice to employees of employers who are members of the movie industry of the existence of Workmen's Compensation Insurance Benefits for

such employees; the right of such employees to reject the provisions of the Arizona Workmen's Compensation Law; that if they do not reject the law they are deemed to have accepted the benefits thereof; the amount of their compensation benefits and the manner in which the same shall be determined and to form an agreement between the employer and the Industrial Commission of Arizona with respect to the computation of premiums of such policies.

12. Subsequent to the adoption of the form of "Exhibit 25" in evidence by the Industrial Commission and the movie industry, the Industrial Commission of Arizona, in accordance with its administrative practices, assigns an investigator to each employer in the movie industry filming a picture or a portion of a picture in the State of Arizona to contact each employee of such employer, present "Exhibit 25" to such employee for signature and to explain, upon request, the content, purpose and function of said document.

13. In connection with his employment by employer, Plaintiff came from the State of California to Prescott, Arizona, on March 11, 1962. On that date employer maintained a business office in the St. Michael's Hotel in Prescott, Arizona, in connection with its filming location near Perkinsville, Arizona, and in the Arcadia Lodge Motel in Kingman, Arizona, in connection with its filming location near Oatman, Arizona.

14. On the 12th day of March, 1962, one Harry J. Hamilton, an employee and investigator of the Industrial Commission of Arizona, having been assigned by said Commission to the Prescott and Perkinsville office and location of the employer in connection with the filming of the picture "HOW THE WEST WAS WON", presented "Exhibit 25" in evidence to the plaintiff while on location at Perkinsville, Arizona, and said "Exhibit 25" was signed by the Plaintiff on that date.

15. The Plaintiff knew that the person presenting said "Ex-

[illegible] to him for signature was an employee of the Industrial Commission of Arizona, and he further knew that the document which he signed, among other things, provided that in case of injury in the course of his employment his Workmen's Compensation Benefits would be a maximum of 65% of $1,000.000 per month.

16. At the time the plaintiff signed "Exhibit 25" in evidence he was not misled, defrauded, coerced or otherwise prohibited from reading or understanding all of the provisions thereof.

17. The employer had the statutory notice of Workmen's Compensation posted upon a bulletin board located near the paymaster's desk in its office in the St. Michael's Hotel in Prescott, Arizona.

18. The plaintiff was in the aforesaid office of the employer in the St. Michael's Hotel in Prescott, Arizona, on or about March 12, 1962, and received cash for a meal allowance from the auditor or paymaster of the employer in said office.

19. On or about March 18, 1962, plaintiff was transferred by employer to Kingman, Arizona, where he worked at its filming location at Oatman, Arizona, until the latter part of March, 1962.

20. Omitted.

21. In addition to the aforesaid offices at Prescott and Kingman, Arizona, from on or about March 12, 1962, until on or about April 25, 1962, employer maintained an office in the Velda Rose Motel east of Mesa, Arizona, and had a filming location on the Magma Railroad west of Superior, Arizona. Meal allowances and advances on salaries to employees working in connection with the filming on the Magma Railroad were paid by employer from its office in the Velda Rose Motel.

22. During the latter part of March, 1962, or early April, 1962, plaintiff was transferred from Kingman, Arizona, to Mesa, Arizona.

23. Various employees of employer stayed at the Ramada Inn

in Phoenix and at the Superstition Ho Hotel at Apache Junction in connection with the filming work which employer did on the Magma Railroad. Bulletin boards for call sheets and other notices were maintained by employer in each of these hotels.

24. The employer had the statutory notice of Workmen's Compensation posted in its office in the Velda Rose Motel, east of Mesa, Arizona, first upon the end of the counter and then on the bulletin board from on or about March 12, 1962, until said office was closed on or about April 25, 1962.

25. The places where the Workmen's Compensation notices were posted on defendant's premises were conspicuous but defendant did not prove that such a notice was posted in or about the Ramada Inn or the Superstition Ho Hotel or on the job site near Queens where it was doing filming work on the Magma Railroad at the time of plaintiff's injury.

26. The employer had the rejection slips referred to in Section 23-906, ARS, available at its office where plaintiff was employed and at each of its offices in the State of Arizona during all of the time of plaintiff's employment.

27. On April 9, 1962, while engaged in doing stunt work on location near Superior, Arizona, in the course and scope of his employment, plaintiff sustained the injuries out of which his present claim arose.

28. Following his injuries on April 9, 1962, plaintiff was hospitalized in Good Samaritan Hospital in Phoenix, Arizona, until September 4, 1962, at which time he was released to go to a hospital in Los Angeles, California.

29. Following his admission to the hospital and on or about April 16, 1962, plaintiff sought and obtained the legal advice of the law firm of Snell & Wilmer, Phoenix, Arizona, and in particular, consulted with Mr. Frederick K. Steiner, Jr., a partner, and Donald Daughton, an associate of that law firm.

30. On April 16 and again on April 19, 1962; when plaintiff

was interview by said attorneys while in the hospital, he was lucid and responsive and was able to give an account of the accident and expressed a strong desire to sue his employer for what he believed was their negligence. He advised said attorneys that he had signed some document respecting Workmen's Compensation and that, among other things, said document provided that his benefits would be 65% of $1,000.00 per month.

31. The plaintiff sought and received legal advice from said attorneys with respect to whether or not he had an option to sue his employer for damages; that he was advised by said attorneys that his sole and exclusive remedy was a claim against the Industrial Commission of Arizona for Workmen's Compensation Benefits unless his employer failed to comply with the requirements of the Act in obtaining Workmen's Compensation Insurance, posting of notices of availability of rejection slips. Said attorneys advised him that he should accept Workmen's Compensation Benefits, said advice being given both orally and in writing.

32. After consulting with said attorneys and on or about April 23, 1962, plaintiff executed or caused to be executed and filed with the Industrial Commission of Arizona a document entitled "Workman's Report of Injuries and Application for Benefits".

33. Thereafter and on May 23, 1962; June 27, 1962; July 13, 1962; July 20, 1962; July 28, 1962; August 2, 1962; August 16, 1962; September 1, 1962; September 16, 1962; October 1, 1962; October 17, 1962; November 2, 1962; November 16, 1962; and December 2, 1962, plaintiff executed or caused to be executed documents entitled "Workman's Supplemental Claim for Compensation" and filed or caused the filing of said documents with the Industrial Commission of Arizona, knowing and understanding that these were claims for Workmen's Compensation.

34. The Industrial Commission of Arizona caused to be paid and plaintiff accepted Workmen's Compensation Benefits pursuant to each of the aforesaid "Workman's Report of Injury and

Application for Benefits" and "Workman's Supplemental Claim for Compensation" under and pursuant to the provisions of the laws of the State of Arizona for the period from April 10, 1962, through November 16, 1962, in the total sum of $4,795.41.

35. In addition to the aforesaid Workmen's Compensation Benefits, the Industrial Commission of Arizona paid or caused to be paid medical and hospital expenses of plaintiff in the sum of $15,246.70.

36. On or about October 20, 1962, plaintiff consulted with attorneys Raoul D. Magana of Los Angeles, California, and Charles M. Brewer of Phoenix, Arizona, with respect to any option which he might have to sue his employer and thereafter continued to file supplemental claims for Workmen's Compensation and accepted checks in payment of Workmen's Compensation Benefits.

37. The last check which plaintiff received from the Industrial Commission of Arizona, prior to filing his complaint against employer on December 13, 1962, was accepted, endorsed and cashed by the plaintiff in December of 1962.

CONCLUSION OF LAW

The Court concludes:

1. The plaintiff is charged with full knowledge of the contents of "Exhibit 25" in evidence at all times relevant hereto, and if he failed to read any of the provisions of said document, such failure was due to his own negligence and neglect and was not the result of any fraud or deception on th part of the investigator of the Industrial Commission of Arizona who presented said Exhibit to the plaintiff at the time that he, the plaintiff, executed the same.

2. The plaintiff had actual notice of Workmen's Compensation coverage and of his right to reject the provisions of the Arizona Workmen's Compensation Law and his failure to reject the same conclusively bound him to accept said benefits for any injuries suffered in the course and scope of his employment.

3. Actual knowledge is always better than constructive notice and the actual knowledge of the plaintiff of the contents of "Exhibit 25" in evidence satisfied the requirements of the statutes of this State with respect to the giving of constructive notice by an employer of Workmen's Compensation and the right of employees to reject the benefits of the Act.

4. "Exhibit 25" in evidence, having been negotiated by the movie industry and the Industrial Commission of Arizona, and the same constituting an endorsement to the Workmen's Compensation Insurance Policy issued by the Industrial Commission to the employer and pursuant to the administrative practices adopted by the Industrial Commission of the State of Arizona with respect thereto and the plaintiff having actual knowledge of the contents thereof and his rights thereunder fully complies with all of the legal requirements on the employer to give notice to its employees of the applicability of Workmen's Compsensation Benefits and of the right of its employees to reject the provisions of the Workmen's Compensation Laws of the State of Arizona.

5. The employer fully complied with the provisions of Section 23-906, ARS, with respect to the availability of rejection slips but did not comply with said Section with respect to the continuous posting of the Workmen's Compensation notice referred to in said Section.

6. The plaintiff, by making a claim for Workmen's Compensation Benefits and continuing to accept the same with full knowledge of his legal rights and with full knowledge of the legal conditions precedent to a suit against his employer, waived any right or option, if any, which he ever had to file any claim in this Court against his employer.

7. If plaintiff's exclusive remedy is not vested in the Industrial Accident Commission of the State of California, then his exclusive remedy against his employer is with the Industrial Commission of Arizona under the terms and provisions of the Workmen's Compensation Law of the State of Arizona.

8. By virtue of the foregoing conclusions, this Court does not have jurisdiction over the subject matter of this lawsuit and therefor the defendant's Motion to Dismiss should be granted and this cause should be dismissed and judgment should be entered in favor of the defendant.

JUDGMENT

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED AND DECREED that the defendant's Motion to Dismiss for lack of jurisdiction of this Court over the subject matter of plaintiff's complaint be granted, and that plaintiff's complaint be and it is hereby dismissed with prejudice.

DONE IN OPEN COURT This 5th day of January, 1965.

JACK D. H. HAYS
Judge of the Superior Court

APPENDIX B

AFFIDAVIT

STATE OF CALIFORNIA)
) ss
COUNTY OF SANTA CLARA)

I, RICHARD J. DANIELS, being first duly sworn upon my oath, say:

1. That I am a duly licensed attorney at law admitted to practice in the State of Arizona but now am residing at 1621 Norcen Drive, in the City of San Jose, County of Santa Clara, State of California.

2. That I was Chief Counsel for the Industrial Commission of Arizona from 1963 to 1965 during which time I became aware of a Workmen's Compensation claim filed by Robert D. Morgan and also of his later lawsuit filed against his employer, Metro Goldywn Mayer, in Cause No. 115087 in the Superior Court of Maricopa County, Arizona, for injuries claimed to have resulted from the negligence of the said employer.

3. That Donald J. Morgan, my predecessor as Chief Counsel for the Commission, made an appearance in the said lawsuit on behalf of Metro Goldwyn Mayer by virtue of the Employers Liability Policy of Insurance issued by the Commission to Metro Goldwyn Mayer and as a successor to Donald J. Morgan as Chief Counsel, I later became an attorney of record in the said action.

4. That Rex H. Moore and Charles E. Esser of the law firm of Jennings, Strouss, Salmon & Trask, were employed by MGM and also become attorneys of record in the said cause of action; and I participated with the said attorneys in the preparation for the defense of the said lawsuit and in the hearings hereafter mentioned.

5. That a Motion to Dismiss the complaint of Robert D. Morgan was filed in the cause of action by MGM and a hearing thereon was commenced during June 1964 before the Hon. Jack D. H.

Hayes, which was held over a period of several days and at which hearing I was present.

6. That prior to the said hearing and in preparation therefor I participated with the other defense attorneys in reviewing the facts and the evidence, which included a conference with one GLENN JURGERMEYER, an employee of the Industrial Commission of Arizona; that after the conference with Mr. Jurgermeyer it was determined that he would not be called as a witness for the defense in said cause of action; and that before the hearing commenced Mr. Jurgermeyer was advised that he would not be needed as a witness by the defense.

7. That I have examined carefully the Application for Relief From Final Judgment filed by Robert D. Morgan in the Supreme Court of Arizona in Cause No. 8653, together with all documents and papers attached thereto; that I have given special consideration to those documents or papers which either directly state or imply that I gave either direction or suggestion to Mr. Jurgermeyer to avoid any process server or that he secrete himself, or that he leave Maricopa County; and, I also have given considerable consideration to the further allegation that some representative of MGM gave such advice or direction to Mr. Jurgermeyer.

8. That I did not ever give Mr. Jurgermeyer advise or directions directly or through any other person that he should avoid any process server, disappear, secrete himself, leave Maricopa County, use any fictitious name, or otherwise fail or refuse to appear in court if requested, and I do not know of any other person, including any representatives or attorneys o MGM who gave any surh advice or directions, other than the advice given to Mr. Jurgermeyer at the conference with him which was attended by Mr. Moore and other prior to the time of hearing when it was merely determined that he would not be called by the defense as a witness and he was so advised.

9. That prior to, at all times during, and subsequent to the June 1964 hearing, Charles M. Brewer, one of the attorneys for

Robert D. Morgan, had access to the Morgan files at the Industrial Commission of Arizona, and Mr. Brewer otherwise was aware of the prior participation or activites of Mr. Jurgermeyer as an investigator for the Commission, which is shown in part by the investigative report signed by Mr. Jurgermeyer and his superior, Aaron Nelson, dated April 24, 1962, which is a part of the Application for Relief which showed that Mr. Morgan had been contadted at the hospital, that the Commission's Claim Form C-107 had been obtained, and also that Mr. Morgan had signed the Stipulated Wage Schedule on March 12, 1962 prior to his injury; but at no time prior to, during, or after the said hearing, did Mr. Brewer request the presence of Mr. Jurgermeyer, or did he advise the Court that Mr. Jurgermeyer was required as a witness so that the Court could direct the defense counsel to produce Mr. Jurgermeyes, or did Mr. Brewer request the Court for a continuance pending the subpoena of Mr. Jurgermeyer.

10. That I was not aware of the existence of any subpoena for Mr. Jurgermeyer prior to or at the time of the June 1964 hearing, nor that he was desired as a witness until long after the entry of the Judgment of Dismissal in January 1965, and that I acquired suih information only after the deposition of Mr. Jurgermeyer had been noticed and a Motion for New Trial had been filed in the spring of 1965, after which I participated in a conference with Mr. Jurgermeyer in my office at the Industrial Commission of Arizona, which also was attended by Mr. Moore and others.

11. That during the said conference Mr. Jurgermeyer related to us that he had obtained the signature of Mr. Morgan on the Commission's Form No. C-107, in fact I specifically recall how Mr. Jurgermeyer described to us that it had been necessary for him to put something hard and flat under the paper for Mr. Morgan to sign.

12. That I further recall that in the same conference Mr.

Jurgermeyer related to us that he had left his home on the Sunday night during the hearing strictly on his own volition.

13. That Mr. Jurgermeyer was not an investigator in the legal division of the Industrial Commission but was under the supervision of Mr. Aaron Nelson; I did not give any directions, either to Mr. Nelson or to Mr. Jurgermeyer, relating to the avoidance of service of a subpoena, as I have earlier stated.

14. That while the numerous allegations in the Application for Relief or in the papers attached thereto suggest that the Industrial Commission of Arizona had some interest in keeping Mr. Jurger out of Court as a witness, I can not conceive of any reason why any officer, agent, employee, or attorney of the Industrial Commission would have wanted to withhold any information from the Court which would have resulted in a determination that the Court had jurisdiction to hear evidence in Mr. Morgan's claim against his employer; in fact I recall later advising the members of the Industrial Commission when this issue had been raised that substantal funds would be saved to the Commission if MGM were required to pay a judgment to Mr. Morgan and that this would thereby relieve the Commission of its obligation to pay any compensation for medical benefits.

15. That based upon my knowledge of the practices of the Industrial Commission of Arizona in handling the compensation policies for the movie industry in Arizona and from my knowledge of the files which I have seen, such as the Stipulated Wage Schedule, I am satisfied that Robert D. Morgan could not have been employed by MGM in Arizona unless he either signed the Stipulated Wage Schedule and thereby agreed to be bound by the compensation laws or unless he specifically rejected the benefits of the compensation laws; and I further recall that I saw his signature on the Stipulated Wage Schedule which was admitted in evidence at the hearing in June 1964.

16. That during the hearing before Judge Hayes I heard testimony that Mr. Morgan had signed the Stipulated Wage

Schedule, and also that he had been advised by attorneys from a Phoenix law firm as to his rights under the compensation laws, and that after such advice he accepted and continued to accept periodic compensation payments.

17. That in the Application for Relief is a memorandum directed to me by Thomas L. Hall, dated October 30, 1964, which was more than four months after the hearing before Judge Hayes; that this memorandum was not a result of any proceedings in the Morgan case; that I had learned from another employee of the Commission that two claims of other parties which were similar in nature had been resolved in a contradictory manner, and I had requested Mr. Hall to investigate and report to me; that I had no knowledge of the claims that he was investigating, nor that the claimant, Krouse, had any conncetion with the Morgan case; and that so far as I am aware, the concluding paragraph of the said report was strictly the specultion of Mr. Hall.

18. That I have never had nor do I now have any personal interest in the outcome of the Morgan case and that my only connection with it was solely in my capacity as Chief Counsel of the Industrial Commission of Arizona.

RICHARD J. DANIELS

Subscribed and sworn to before me this 3rd day of May, 1967.
VIVIAN A. HAAGEN

Notary Public in and for the County of Santa Clara, State of California.

APPENDIX C

AFFIDAVIT

STATE OF ARIZONA

ss.

COUNTY OF MARICOPA

I, AARON NELSON, being first duly sworn upon my oath state:

That for the past 28 years, except for 6 years in the Service, I have been and am now employed by the Industrial Commisison of Arizona. Since July, 1964, I have been and am now the head of the Private Carrier Department of the Commission. In June, 1964, and for 12 years before that I was in charge of the investigation section of the Claims Department of the Commission. One of my investigators in June, 1964, was Mr. Glenn E. Jurgemeyer.

On Monday, June 15, 1964, at my direction, Mr. Jurgermeyer took 17 Commission files, which had been pulled during the preceding week, covering cases at Coolidge, Casa Grande and Eloy, Arizona, for a routine investigation of the cases covered by said files in those areas.

Mr. Jurgemeyer was in Phoenix during the week preceding June 15 and had been assigned the above investigations to commence on June 15 as a part of his routine duties. I did not check with nor talk to any attorneys or representatives of Metro-Goldwyn- Mayer, Inc., or with anyone else about assigning Mr. Jurgemeyer to this job on these files in Coolidge, Casa Grande and Eloy. Metro-Goldwyn-Mayer, Inc., had nothing whatsoever to do with my directing Mr. Jurgemeyer to go out on this investigation on June 15, 1964, or at any other time.

Dated this 26th day of April, 1965.

/s/ Aaron W. Nelson

Subscribed and sworn to before me this 26th day of April, 1965.

/s/ Lillian E. Mills
Notary Public

My commission expires: 12-12-66.

SAR 54-55.